

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Joint Request for Review of Decision of the)	CC Docket No. 02-6
Universal Service Administrator)	
)	
Whittier City School District)	File No. SLD-536931 (FY2006)
Trillion Partners, Inc.)	
)	
)	
)	
)	

JOINT REQUEST FOR REVIEW

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May 14, 2007

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SUMMARY

This Joint Request for Review (“Joint Request” or “Appeal”) seeks reversal of a clearly erroneous USAC decision to deny funding for eligible Wireless Internet Access services on the grounds that Whittier allegedly failed to “carefully consider” all submitted bids. Key facts, essentially ignored by USAC, establish that Whittier did so and selected the most cost-effective solution as expressly required by the Federal Communication Commission’s (“Commission” or “FCC”) rules.

In response to a properly posted FCC Form 470 for Funding Year 2006, Whittier received two bids, one from Trillion Partners, Inc. (“Trillion Bid”) and a second from Advanced Scientific Applications, Inc. (“ASA Bid”). The substance of the ASA Bid was contained in 4 lines of an e-mail message sent without any further explanation or support. On its face, the ASA Bid offered services (a separate DS3 connection to each Whittier school) that were non-responsive to Whittier’s 2006 Form 470 request. Nevertheless, Whittier took the initiative to contact the bidder and confirmed that in fact ASA could not offer Wireless Internet Access and that the ASA Bid was over 300% more than the Trillion Bid. As a result, Whittier selected the Trillion Bid and timely filed an FCC Form 471.

In response to a standard Selective Review Information Request, Whittier explained in full the reasons for rejecting the ASA Bid. Nevertheless, USAC denied the funding on the grounds that Whittier had failed to “carefully consider” the ASA Bid. Whittier’s appeal to USAC (“USAC Appeal”) was summarily denied again on the grounds that Whittier’s handling of the ASA Bid failed to satisfy the Commission’s competitive bidding rules. This Joint Request followed.

USAC's actions are unreasonable, arbitrary and capricious. USAC fails to cite a single FCC rule, order or policy to support its rationale for the denial. Whittier inquired as to the terms and conditions of what on its face was a non-responsive, back-of-the envelope bid and had two sound grounds for rejecting it: (1) ASA could not offer Wireless Internet Access services that Whittier requested and (2) ASA was going to charge over 300% more than Trillion for services that Whittier did not want. Clearly, this constitutes careful consideration, arguably more consideration than the ASA Bid deserved or required.

Moreover, under the Commission's rules and decisions, the choice of the technology used to provide eligible services is left to the applicant, not USAC. Yet, USAC's denial here is arguably based on the fact that Whittier did not give closer consideration to using a technology it did not want. Furthermore, the ASA Bid could never have qualified as the most "cost-effective" bid. Had Whittier selected it, USAC would have had a genuine ground for asserting that Whittier had failed to comply with the Commission's competitive bidding requirements.

USAC's denial of Whittier's funding request in such circumstances is clearly erroneous, without any reasonable foundation, and contrary to the intent and purpose of the Commission's competitive bidding rules. We respectfully request the Commission to promptly grant this Joint Request and remand the Whittier 2006 Form 471 Application to USAC with instructions that the funding request for Wireless Internet Access services be granted.

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File No. SLD-536931 (FY2006)

To: The Commission

JOINT REQUEST FOR REVIEW

Whittier City School District (“Whittier” or “District”) and Trillion Partners, Inc. (“Trillion”) (collectively, the “Parties”), acting pursuant to Section 54.719(c) of the Federal Communication Commission’s (“Commission” or “FCC”) rules, hereby submit this Joint Request for Review (“Request” or “Appeal”) seeking reversal of a decision made by the Schools and Libraries Division of the Universal Service Administrative Company (“USAC” or “Administrator”) denying a funding request by Whittier for its Funding Year (“FY”) 2006 FCC Form 471 Application (“Application”).

The Request is timely filed. Section 54.720(b) of the Commission’s rules requires the filing of an appeal “within sixty (60) days of issuance” of a decision by USAC. The latest USAC denial was dated March 15,2007, and sixty (60) days thereafter is May 14,2007.

I. STATEMENT OF THE PARTIES' INTEREST IN THIS REQUEST FOR REVIEW

The Parties have standing to file this Appeal because Section 54.719(c) of the Commission's rules provides that, "[a]ny person aggrieved by an action taken by a division of the Administrator ... may seek review from the Federal Communications Commission." In this case, Whittier filed the Application seeking the funding denied by USAC. Trillion is directly aggrieved by that denial of funding, because Trillion executed a legally binding contract on the allowable contract date with Whittier to provide Internet Access services in connection with the Application. The Parties bring this Request to the FCC after the denial of ~~an~~ appeal filed by the District with USAC ("USAC Appeal"), as permitted under Section 54.719(c) of the Commission's rules.²

II. INTRODUCTION

USAC has twice improperly denied Whittier the requested funding for Internet Access on the grounds of an alleged violation by Whittier of the competitive bidding requirements contained in Section 54.511(a) of the Commission's rules.³ Specifically, USAC claims that Whittier's decision to reject a 4 line e-mail bid to provide wired Internet Access, at a rate 300%

¹ 47 C.F.R. § 54.719(c).

² *Id.*

³ 47 C.F.R. § 54.511(a) ("[E]ntities shall carefully consider all bids submitted and must select the most cost-effective service offering. In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount process submitted by providers but price should be the primary factor considered.").

higher than that offered by Trillion, constitutes a failure to “carefully consider all bids and chose [sic] the most cost effective solution.”⁴

The salient facts demonstrate that USAC’s reading and application of the Commission’s competitive bidding requirements in this case are contrary to any reasonable interpretation of those requirements or their appropriate administration. USAC’s twice erroneous decision must be promptly reversed. In addition, because Whittier already has undergone a selective review for FY2006 and has provided USAC with all pertinent and relevant information in connection with that review, the Parties respectfully request that the Commission promptly grant this Appeal and remand this matter to USAC with the directive that the Application be granted.

III. STATEMENT OF FACTS⁵

A. The Parties.

Whittier is a public school district in and around Whittier City, California. The Application seeks support for Internet Access services at 14 eligible locations within the District.

Trillion provides E-rate eligible, secure broadband services to the educational market. It is a service provider of fixed licensed wireless and fiber WANs for K-12 school districts in the United States, serving hundreds of school districts and over 1,500 schools nationwide.

⁴ Administrative Record (“AR”) AR00001-3 (USAC, Nov. 14, 2006 Funding Commitment Decision Letter, hereinafter “FCDL”).

⁵ All of the facts set forth in the “Statement of Facts” section of this Request for Review are based on the Administrative Record (“AR”) compiled and attached hereto and further have been attested to, under penalty of perjury, by Reiner Dixon, Assistant Superintendent: Business for Whittier City School District; Jamie Mayhew, Director, Technology and Information Services for Whittier City School District; and Scott Smyth, Vice President of Legal and Regulatory for Trillion Partners, Inc.

B. The Whittier 2004 Application.

On November 18, 2003, Whittier posted an FCC Form 470 for FY 2004 seeking, among other services, Internet Access.⁶ The FCC Form 470 indicated that Whittier will “consider multi-year contract[s].” On December 16, 2003, Whittier submitted an FCC Form 471, seeking support for Internet Access under Funding Request Number (“FRN”) 1205184 pursuant to a contract with Trillion.⁷ The contract was awarded on February 4, 2004 for five (5) years for a “wireless Wide Area Network (WAN) ...”⁸

In 2006, as a result of a potential relocation of a wireless pole at one of the schools being served, Trillion submitted a proposal to amend the then current contract from 5 years to 7 years. Whittier further requested additional telecommunications services.⁹ The new contract was contingent on Whittier’s receipt of USAC support at an expected 82% level. As a result of these potential contract changes, Whittier decided, out of an abundance of caution, to recompet the services being provided by Trillion by posting a new FCC Form 470 for FY2006.¹⁰

⁶ ARO0004-10 (FCC Form 470 No. 612230000470206, hereinafter “Whittier 2004 Form 470”).

⁷ AR00011-14 (FCC Form 471 No. 432986, hereinafter “Whittier 2004 Form 471”).

⁸ AR00015 (Memorandum dated Feb. 15, 2006 from Whittier Superintendent to Whittier Board of Education, hereinafter “Superintendent Memo”).

⁹ *Id.*

¹⁰ In certain instances under the Commission’s rules, an applicant submitting an FCC Form 470 which indicates that a multi-year contract may be awarded need not post a new FCC Form 470 each year of the term when no new services are being sought. Rather, an FCC Form 471 **may** be submitted for each year for which USAC funding support is sought based on the original FCC Form 470.

C. The Whittier 2006 Application.

1. The Whittier 2006 Form 470.

On January 17, 2006, Whittier posted an FCC Form 470 seeking Telecommunications Services and Internet Access.” The allowable contract date was February 14, 2006. Under the Internet Access category, the Whittier 2006 Form 470 specified in Block 9 that it was seeking “Internet Access,” “Wireless Internet Access” and “Taxes, surcharges and other similar charges.” Nothing else was specified by Whittier and no separate Request for Proposal (“RFP”) was issued by Whittier for these services, as was indicated on its 2006 Form 470.

2. The Two Bid Responses to the Whittier 2006 Form 470.

Whittier received two responses from potential service providers to its request for Internet Access on the Whittier 2006 Form 470.

Trillion submitted a bid proposal to the District to provide Wide Area Network (“WAN”) Services to fourteen (14) sites (including all of the District schools) for a monthly Total Service Charge of \$20,500.00 (or a total annual charge of \$246,000.00) (“Trillion Bid”). On a per site basis, the Trillion proposal was for \$1,464.29 per site per month or \$17,571.43 per site per year. The Trillion Bid was reflected in a detailed, proposed Services Agreement, with a separate Service Level Agreement for the WAN Services for Internet Access.¹² The Trillion Bid

¹¹ AR00016-22 (FCC Form 470 Application Number 203350000579639, hereinafter, “Whittier 2006 Form 470”). The telecommunications services requested by Whittier on the Whittier 2006 Form 470 are not at issue in ~~this~~ Appeal.

¹² AROOO23-26 (Trillion Partners, Inc. Services Agreement, attaching **only** pertinent pages that include the ServiceLevel Agreement for WAN Services with terms and pricing, hereinafter “Trillion Bid”).

would supersede the previously approved five-year contract between Trillion and the District for identical Wireless Internet Access services at the same monthly rate per site.¹³

The second bid proposal was submitted to Whittier by Advanced Scientific Applications, Inc., CruzNet Division (“ASA”). The entire bid proposal consisted of a brief electronic message from Aida M. Perez, Sales Representative. The substantive text of the bid proposal itself was just four lines in the message and read as follows: “Our bid for your requested Wireless Internet Access for DS3 is \$4999.00/month. Taxes, surcharges and other similar charges is [sic] included. DS3 service is dedicated and full time at full capacity. We offer excellent customer service and provide technical support 24/7 @ 800-982-1845” (“ASA Bid”).¹⁴ The ASA Bid was not accompanied by any other supporting or explanatory information. No previous communication with ASA had taken place prior to Whittier’s receipt of the brief e-mail proposal.

3. Whittier Researches the ASA Proposal.

Because of the cryptic nature of the ASA Bid, Whittier contacted Ms. Perez, the ASA Sales Representative, directly by telephone. As a result, Whittier learned that ASA’s Bid proposed a monthly charge of \$4999.00 for each District site served by a dedicated DS3 line, making the total monthly cost \$69,986.00 versus the \$17,541.73 total monthly cost contained in the Trillion Bid, for wireless service to the same number of sites (*i.e.*, fourteen (14)). On an annual basis, the cost to Whittier of the ASA Bid using dedicated DS3 service would be \$839,832.00, versus \$246,000.00 for the Trillion Bid. Simply put, the ASA Bid for dedicated

¹³ AR00015 (Superintendent Memo, *supra*, n. 8).

¹⁴ AR00027 (E-mail from Aida M. Perez, Sales Representative, ASA, Inc., CruzNet Division to Jaime [sic] Mayhew, hereinafter “ASA Bid”).

“Wireless Internet Access for DS3” was over three (3) times more costly than the Trillion Bid. Moreover, in reality the ASA Bid was not a wireless service offering at all.

During its discussion with Ms. Perez, Whittier inquired whether ASA could provide Wireless Internet Access. Whittier was told by the Sales Representative that ASA could not provide Wireless Internet Access on a district wide basis, which was one of the options requested in the Whittier 2006 Form 470 and precisely the service that Whittier was seeking.¹⁵

4. The Whittier 2006 Form 471.

Because ASA was not able to provide Wireless Internet Access, a service that Whittier already utilized, Whittier Superintendent of Schools proposed to the Whittier Board of Education that Whittier accept the Trillion Bid.¹⁶ On February 15, 2006, the Board approved the contract “with Trillion Partners for Wireless Internet WAN.”¹⁷ On February 16, 2007, after executing the contract with Trillion,” Whittier submitted its FCC 2006 Form 471 Application No. 536931 to USAC.¹⁹ The Whittier 2006 Form 471 included the Funding Request Number (“FRN”) 1486369, reflecting the acceptance of the Trillion Bid for Internet Access at the cost reflected above.

In accordance with the Commission’s rules, Whittier certified on its 2006 Form 471 that “all bids were carefully considered and the most cost effective service offering was selected,

¹⁵ AR00028-29 (Whittier, Dec. 14, 2007 Appeal of Funding Commitment Decision 2006 FRN 1486369, hereinafter “Whittier USAC Appeal”).

¹⁶ AR00015 (Superintendent Memo, *supra*, n. 8).

¹⁷ *Id.*

¹⁸ AR00030 (Trillion Partners, Inc. Services Agreement, attaching **only** the signed Description of Services page with Wireless Area Network Services pricing).

¹⁹ AR0003 1-37 (FCC Form 471 Application No. 536931, hereinafter “Whittier 2006 Form 471”).

with price being the primary factor considered”²⁰ Whittier further certified that the Trillion Bid was “the most cost effective means of meeting educational needs and technology plan goals.”²¹

D. Post Whittier 2006 Form 471 Communications with USAC.

1. USAC’s Selective Review Information Request and Whittier’s Responses.

On May 8, 2006, USAC issued a Selective Review Information Request (“SRIR”) to Whittier that covered the Whittier 2006 Form 471.²² The response period for Whittier was ultimately extended to June 14, 2006.²³ Whittier provided a response to the competitive bid question on June 8, 2006.²⁴

The USAC 2006 SRIR inquiries included a standard request for information regarding the bids and proposals submitted in response to the Whittier 2006 Form 470. Whittier responded with information pertinent to the Trillion Bid and the ASA Bid. Whittier explained in its SRIR response that the ASA Bid had been “rejected” because it “did not meet the wireless requirements as posted on the ... [Form] 470.”²⁵

On September 13, 2006, USAC, in a follow up to this response, asked Whittier to “identify the reason(s) why the bid was *disqualified* and where the requirement that was not met

²⁰ AR00035 (Whittier Form 471).

²¹ *Id.*

²² AROOO38-47 (USAC May 8, 2006 **SRIR** to Whittier, hereinafter “USAC 2006 **SRIR**”).

²³ AR00048 (E-mail from USAC to Whittier).

²⁴ AR00049 (Whittier Competitive Bid Vendor Selection Response to USAC 2006 **SRIR**, dated June 8, 2006, hereinafter “Whittier June Response”).

²⁵ *Id.*

is cited in documentation available to the vendor, i.e., RFP, or Form 470 etc.”²⁶ Whittier never used the word “disqualified” when referring to the ASA Bid; rather USAC coined that term.

Again, Whittier reiterated its response to USAC the next day as follows:

ERATE 470 #203350000579639 was posted for District-wide wireless Internet and telecommunications services including all related services and charges. No separate RFP was posted. Service request as listed in sections 8 and 9 was for Wireless Internet Access Districtwide including WAN Voice and Data Services. The bid from Advanced Scientific Applications, Inc. did not meet the wireless requirements as posted on the E-Rate 470 as it was for a dedicated DS3. A follow-up conversation with Aida Perez confirmed that her company was unable to provide the requested service and the bid was rejected.²⁷

Whittier had no further written communications with USAC concerning the ASA Bid until two (2) months later. Again, at no time did Whittier tell USAC that the ASA Bid had been disqualified.²⁸

E. USAC’s Denial of FRN for Internet Access.

On November 14, 2006 USAC issued a Funding Commitment Decision Letter (“FCDL”) to Whittier and Trillion denying all the funding for Internet Access in the Whittier 2006 Form 471.²⁹ USAC indicated that the denial was the result of a “Bidding Violation.” More specifically, USAC explained that the “FCC rules require applicants to carefully consider all bids

²⁶ AR00050 (USAC Letter to Whittier re Whittier June Response, dated Sept. 13, 2006 (emphasis supplied), hereinafter “USAC 2006 SRIR Follow-Up”).

²⁷ AR00051 (Whittier Response to USAC 2006 SRIR Follow-Up, hereinafter “Whittier September Response”).

²⁸ Whittier included the word “disqualification” in the title of the Whittier September Response, but this merely was to identify the information as being a reply to USAC’s question, which had originated the term “disqualification.” Whittier’s response explained that the bid had been considered but “rejected,” consistent with previous information submitted.

²⁹ AR00001-3 (Whittier FCDL).

and chose [sic] the most cost effective solution. Documentation demonstrates that the applicant did not consider all bids. Therefore, the applicant has violated the competitive bidding rules.”³⁰

F. Whittier’s Appeal to USAC.

On December 14, 2006, Whittier filed a timely appeal with USAC seeking reversal of USAC’s denial.³¹ Therein, Whittier observed that “the full response from ASA ... consists of an email with [a total of] eight lines of content.”³² Whittier further clarified that “the District went to the lengths of contacting them [ASA] to gain more complete information of their service and offerings to ensure a full and fair process prior to awarding the contract, only to be advised by ASA that they could not provide the service as required to all...locations.”³³ Whittier stated that the ASA Bid was given “full and fair consideration to ensure that it did not offer a more compelling or cost effective solution than the other bid.”³⁴ Because the brief e-mail bid from ASA only indicated a price of \$4,995.00 per month, Whittier explained in its USAC Appeal that it had determined, as a result of the call with Aida Perez, that this was a monthly charge per site. Whittier noted the dramatic cost difference that the ASA Bid “did not offer a more compelling or cost effective solutionby a significant margin.”³⁵ Whittier attached both the ASA and Trillion Bids to its USAC Appeal.

³⁰ AR00001-3 (Whittier FCDL).

³¹ AROOO28-29 (Whittier USAC Appeal).

³² AR00029 (Whittier USAC Appeal).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

G. USAC's Denial of Whittier's Appeal.

On March 15, 2007, USAC denied the Whittier USAC Appeal.³⁶ The USAC Appeal Decision Letter failed to even mention the “carefully consider all bids” standard that USAC had cited in its FCDL decision. Rather, USAC first cited the June and September exchanges with Whittier on the subject of the ASA Bid. Then it denied the USAC Appeal because “the bid from ASA listed that it was for Internet Access for DS3 and for Wireless Internet Access ...and [t]herefore USAC correctly determined that the vendor selection process did not comply with the competitive bidding rules of the Schools and Libraries Support Mechanism.”³⁷ USAC cited no USAC policy, ruling, announcement or FCC rules or orders in support of its improper *summary* denial of Whittier's USAC Appeal.

IV. ARGUMENT

USAC improperly denied Whittier's 2006 FCC Form 471 during the Selective Review and then wrongly and unjustifiably denied Whittier's USAC Appeal.³⁸ Twice, USAC failed to understand and apply the FCC rules to its review. The result of the Administrator's failure in this instance is that Whittier has wasted untold time responding and appealing a funding matter that should have been approved. Ultimately, the real victims of this failure are Whittier's school children. USAC's actions are exactly contrary to the goals of the Universal Service Fund, creating significant financial pressure to limited education dollars that could otherwise be

³⁶ AR00052-53 (USAC Administrator's Decision on Appeal-Funding Year 2006-2007, Form 471 Application Number 536931, FRN 1486369, dated Mar.15, 2007, hereinafter “USAC Appeal Decision”).

³⁷ AR00053 (USAC Appeal Decision).

³⁸ The Commission's review of USAC's actions under Section 54.719 of its rules is *de novo*.

devoted to providing better educational opportunities to America's children, and must be overturned.

Whittier's handling of ASA's brief e-mail (a back-of-the-envelope) bid in this case satisfied the Commission's competitive bidding rules. Whittier diligently made further inquiry to clarify the terms of the ASA Bid by directly contacting the ASA Sales Representative, who submitted the brief bid proposal and inquiring as to exactly what services ASA was proposing and able to provide. In addition, Whittier clarified the most important component of the ASA Bid – the cost – which turned out to be over 300% more than the Trillion Bid. By any fair and reasonable application of the Commission's standard, by conducting such further inquiry, Whittier "carefully considered" the ASA Bid. USAC apparently has improperly seized upon Whittier's use of the term "rejected" to support an unfounded conclusion that the ASA Bid was never "considered" by Whittier. Such reasoning is belied by the facts.

Further, nothing in the Commission's rules required Whittier to accept a non-wireless solution to the request for Wireless Internet Access contained on the Whittier 2006 Form 470. Yet, as a result of Whittier's further inquiry of the ASA Bid, it determined that ASA was wholly incapable of providing a wireless solution. Again, Whittier's preference for the continued use of wireless technology and decision to accept the Trillion Bid, to the exclusion of the ASA Bid, on that basis, is in full compliance with the Commission's competitive bidding rules, particularly given that the ASA Bid was over 300% more than the Trillion Bid.

Although the Commission has not set specific, bright lines on when such differences determine the "cost effectiveness" of a particular bid, Whittier's selection of the Trillion Bid over the ASA Bid was clearly justified as "the most cost effective service offering." The

Commission has said that a bid that is 2-3 times higher than otherwise available would not be cost effective, absent extenuating circumstances. There are no such circumstances in this case.

A. Whittier Carefully Considered the ASA Bid.

Section 54.511(a) of the Commission's rules requires, among other things, that "[i]n selecting a provider of eligible services, schools ... shall carefully consider all bids submitted and must select the most cost-effective service offering." Contrary to USAC's unreasonable and unsupported decisions, Whittier complied with the Commission's standard by evaluating both bids received and selecting the Trillion Bid.

USAC does not detail or explain what steps Whittier failed to take in "considering" the e-mailed ASA Bid, the substance of which was just four lines long and included no detail or explanation. There was little or no written information for Whittier to peruse or analyze in ASA's Bid.

It is incumbent upon the service providers to provide responsive bid proposals or seek further clarification from the applicants when required. ASA did not do this. The applicants are not required to "track down" service providers who provide cryptic, unresponsive bids, and the Commission's rules must not be interpreted to burden the applicants with such a requirement. Indeed, the FCC Form 470 instructions clearly provide that the information provided in items 8-11 on the form is intended to provide potential service providers with information "so that they may contact ...[the applicant] if necessary for detailed information on...[the applicant's] specific requirements."

Whittier went beyond the Commission's standard **and** contacted the ASA Sales Representative that submitted the ASA Bid and determined (a) that the cost would be over 300% more than what Trillion had proposed for its Wireless Internet Access solution and (b) that

ASA's Bid in actuality did not include Wireless Internet Access, but, rather ASA had no capability to provide any such wireless access. Whittier provided this information to USAC. Incredulously, USAC summarily denied Whittier's USAC Appeal.³⁹

The Commission's competitive bidding rules do "contemplate that applicants will compare different providers' prices for actual services eligible for support" because only by doing so "can applicants ensure that, in accordance with [FCC] rules, they are receiving the most cost-effective services."⁴⁰ Whittier satisfied that most important requirement in this case.

In fact, the ASA Bid was not only unresponsive; it was also incorrect and incomplete. Indeed, ASA effectively offered apples to Whittier's request for oranges; namely, ASA proposed a dedicated DS3 wireline connection to each of the sites to be served and tried to characterize its bid as responsive to a request for Wireless Internet Access. As Whittier discovered through its inquiry, ASA had no wireless capability. Yet USAC, in both its original denial for the funding request and denial of Whittier's USAC Appeal, has failed to consider and give any weight to record evidence in this matter, specifically, Whittier's initiative to conduct due diligence by

³⁹ The Commission has increasingly warned USAC about summarily denying funding without providing an applicant with a substantive explanation of alleged deficiencies and providing a reasonable opportunity for the applicant to respond and/or take corrective action. *See e.g., In re Requests for Review & Decisions of the Universal Service Administrator by Academy of Excellence*, FCC 07-60, released May 8, 2007 (explanation and opportunity to address questions regarding applicant resources); *In re Requests for Review & Decisions of the Universal Service Administrator by Bootheel Consortium*, FCC 07-62, released May 8, 2007 (explanation and opportunity to address questions regarding eligible entities); *In re Requests for Review & the Decision of the Universal Service Administrator – Academia Claret, Puerto Rico, et al*, 21 FCC Rcd 10703 (2006) (explanation and opportunity to respond to alleged defects in applicant conducted surveys). Yet here USAC summarily denied funding with no explanation of specific rules or orders allegedly violated. Presumably that was because there are none. The Commission should consider an additional "processing directive" that requires USAC to include such citations in any funding denial.

⁴⁰ *In re Request for Review & the Decision of the Universal Service Administrator by Ysleta Independent School District*, 18 FCC Rcd 26406, 26418 ¶24 (2003) ("Ysleta Order").

further researching the ASA Bid and Whittier's appropriate conclusion that the ASA Bid was not as cost effective as the other bid received.

USAC arbitrarily and improperly grounds its claim that these actions do not meet the FCC rule's "consideration" standard because Whittier, in communications with USAC, indicated that it had "rejected" the ASA Bid. However, USAC improperly on its own sought to claim that Whittier represented that the ASA Bid was "disqualified" and thus not "considered." Such reasoning ignores Whittier's inquiry and analysis of the ASA Bid, both as to the services offered and the cost thereof. Rather, USAC assumes that these terms mean that upon receipt of the ASA Bid, Whittier did nothing more.

The facts established by the record clearly belie that incorrect USAC assumption. Whittier clearly communicated to USAC what steps it had taken and the reasoning behind its decision not to proceed further with the ASA Bid. The ASA Bid in fact was fully considered, but was legitimately found not to provide the Wireless Internet Access services requested. ASA's Sales Representative specifically told Whittier that ASA did not have the capability to provide the requested wireless services.

B. Whittier Was Not Required to Further Pursue a Technical Solution that did not Meet Its Needs.

A basic tenet of the E-rate program is that the applicants, not USAC, choose the eligible services and technology that best meets their specific educational goals. USAC, in denying Whittier's USAC Appeal, implies that Whittier violated the Commission's competitive bidding rules by failing to **give** closer consideration to the Internet Access service, albeit non-wireless, offered by the ASA Bid. This rationale for denying Whittier's funding request is at odds with a fundamental precept of the E-rate program, namely that "schools and libraries should have

maximum flexibility to purchase the package of services they believe will most effectively meet their communication needs.”⁴¹ As the Commission has more recently recognized – “[T]he applicant is the best entity to determine what technologies are most suited to meet the applicant’s specific educational goals. The applicant’s specific goals and technology plans are therefore unique to the applicant.”⁴²

In this case, Whittier listed Wireless Internet Access on a district wide basis on the Whittier 2006 Form 470. This is totally permissible. The Commission has clearly recognized this principle in its *Ysleta Order*, where it held that “[a]n applicant may, in certain circumstances, list multiple services on its FCC Form 470, knowing that it intends to choose one over another.”⁴³ Whittier was perfectly within its rights, having investigated ASA’s ability to provide a Wireless Internet Access solution, to decide not to adopt the dedicated DS3 proposal put forward in the ASA Bid, particularly when it cost over 300% more than the Trillion Bid. Moreover, Whittier had already had satisfactory experience with Wireless Internet Access service.

USAC’s rationale for rejecting Whittier’s USAC Appeal is incomprehensible and demonstrates a lack of foundational understanding of the differences in technology and the competitive bid requirements in this case. Denial on the “grounds” cited by USAC is an invented policy that is not supported by any law or FCC order and arbitrarily and capriciously ignores the facts twice presented by Whittier to USAC. USAC has offered no counter to those

⁴¹*In re Federal and State Joint Board on Universal Service*, 12FCC Rcd 8776, ¶425 (1997).

⁴² *Ysleta Order*, ¶30.

⁴³ *Ysleta Order*, ¶36. The FCC Form 470 Instructions provide that the “requirement [to specify the technologies of interest] is not intended to restrict your ability to [obtain] whatever technologies best meet your educational purposes as authorized by FCC Rules and the Telecommunications Act of 1996.”

facts or given any indication of what further investigation of ASA's clearly inadequate and non-responsive bid was expected. None could be expected under any reasonable interpretation and application of the Commission's competitive bidding rules.

C. Whittier Complied with the Competitive Bidding Requirement to Select the Most Cost-Effective Bid.

Section 54.511 of the Commission's rules also requires that the applicant "must select the most cost-effective service offering." As the Commission only recently reiterated, "[t]he goal of the competitive bidding process is to ensure that funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available."⁴⁴ Here the ASA Bid was over 300% more than the Trillion Bid.

While the Commission has not set a specific bright line on what multiple of cost difference violates the "most cost-effective" principle, it has indicated that "two or three times greater ... would not be cost effective, absent extenuating circumstances."⁴⁵ The ASA Bid beat that margin substantially and, therefore, Whittier's rejection of the ASA Bid was mandated by the Commission's competitive bidding rules.

Finally, although applicants must select the most cost-effective offering and price must be the primary factor in selecting a bid, "applicants are given maximum flexibility to take service quality into account and may choose the offering that meets their needs most effectively and

⁴⁴*In re Application for review of the Decision of the Universal Service Administrator by Aberdeen School District*, FCC 07-63, released May 8, 2007, at p. 7

⁴⁵*Ysleta Order*, ¶54.

efficiently.”⁴⁶ Clearly, in rejecting the ASA Bid, Whittier exercised that right. USAC may not deny funding for the Wireless Internet Access service selected as a result of Whittier’s choice.

V. CONCLUSION AND REQUEST FOR RELIEF

The Parties respectfully submit that USAC’s denial of Whittier’s requested funding support for Wireless Internet Access is not supported by the facts or law. Whittier gave due consideration to the ASA Bid, such as it was, by making further inquiry, albeit not required, into the price and service terms. The ASA Bid greatly exceeded the Trillion Bid in costs and did not provide the wireless services that Whittier had every right to choose under the Commission rules.

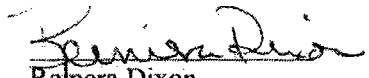
Furthermore, an antonym for the word “reject” is “accept.” USAC’s faulty reasoning, which finds that Whittier’s rejection was unacceptable, would require Whittier to “accept” a bid that was over three times more expensive than the solution chosen, contrary to FCC rules that require selection of the most cost effective bid.

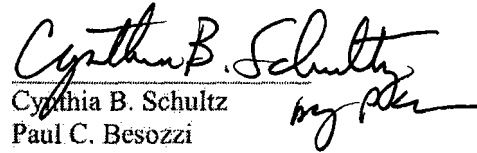
The Commission must reverse the USAC denial and return the Application to USAC with the instruction to issue a decision based upon a complete review of Whittier’s application within thirty (30) days. Further, as set forth above, as permitted under the FCC’s rules, Whittier has entered into a multi-year contract with Trillion for a period of seven (7) years for Wireless Internet Access. The Parties respectfully request the Commission to grant this expedited relief, because USAC’s unsupported and improper denial in this case will subject each subsequent application for Wireless Internet Access to be provided under that contract to further denial, based upon USAC’s erroneous conclusion that the original Form 470 is tainted as a result of Whittier’s alleged failure to consider the ASA Bid. Such a result is grossly unfair and must not

⁴⁶*In re Request for Review by the Wyoming Department of Education*, 21 FCC Rcd 2110, 2114 ¶8 (2006).

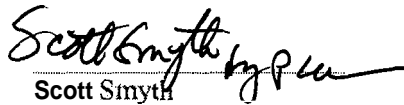
be allowed to **stand**. The Parties request the Commission to also order USAC to cease any further **Selective Review** that is being conducted as a result of USAC's incorrect denial in this matter.

Respectfully submitted,


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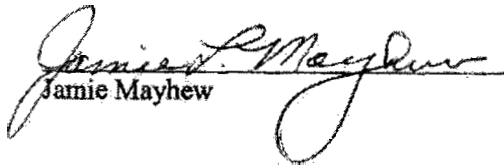

Scott Smyth
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Austin, TX 78758
(512) 304-4100

May 14, 2007

DECLARATION OF JAMIE MAYHEW

1. My name is Jamie Mayhew. I am the Director, Technology and Information Services, Whittier City School District.
2. All of the facts set forth in the Joint Request for Review in the section titled, "Statement of Facts" as they relate to Whittier, including its interactions with USAC, are true and correct to the best of my knowledge.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 14th day of May, 2007.



Jamie Mayhew

* * *

DECLARATION OF REINERA DIXON

1. My name is Reinera Dixon. I am the Assistant Superintendent: Business for Whittier City School District.
2. All of the facts set forth in the Joint Request for Review in the section titled, "Statement of Facts" as they relate to Whittier, including its interactions with USAC, are true and correct to the best of my knowledge.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 14th day of May, 2007.

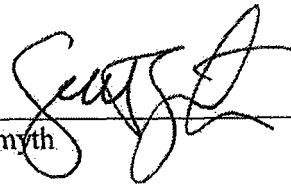

Reinera Dixon

DECLARATION OF SCOTT SMYTH

1. My name is Scott Smyth. I am the Vice President of Legal and Regulatory for Trillion Partners, Inc.
2. All of the facts set forth in the Joint Request for Review in the section titled, "Statement of Facts" related to Trillion and the actions taken by Trillion are true and correct to the best of my knowledge,
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 14th day of May, 2007.

Scott Smyth

A handwritten signature in black ink, appearing to read 'Scott Smyth', is written over a horizontal line.

CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 14th day of May, 2007, a copy of the foregoing Joint Request for Review has been served via electronic mail or first class mail, postage pre-paid, to the following:

Michelle Carey
Senior Legal Advisor to Chairman Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Michelle.Carey@fcc.gov

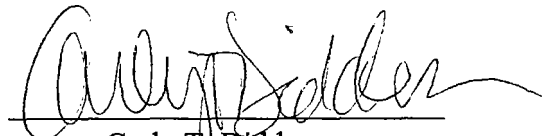
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Carly T. Didden